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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 704

JOHN J. CASALE, INC.,
Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Appellees.

REPLY OF APPELLANT TO APPELLEES' MOTION TO AFFIRM

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There is here involved the validity of another order of the Interstate Commerce Commission. The court below indicated the order probably is invalid, and could be later set aside should need arise, but considered that not yet is the matter ripe for judicial cognizance under the reviewing statute. The suit was said to be premature.

Direct appeal to this Court was, however, allowed as a matter of right under familiar provisions of the statutes governing the review of orders of the Commission. As usual counsel for the Government then interposed their motion to affirm. Their right so to file cannot be questioned by appellant of course; but this general practice of moving in this Court to affirm whenever the Government prevails in the courts below in Commission cases seems to suppose that no substantial question is ever presented here on appeals so long as the Government deems its position in the courts below was correct.

But it would seem that the procedural privilege of moving to affirm more properly should be confined in its exercise to those few instances in which it might truly be said that the issues involved are so positively required to be decided only in one way as to make the appeal virtually

frivolous. Moreover when Congress directed that appeals to this court may be taken as of right where the validity of orders of the Commission is involved more was intended than merely to serve the purpose of individual cases. It was considered important to assure comprehensiveness of devision for the further guidance of the Commission and the bar. A recent exampie was No. 105, October Term, 1943, *Eastern-Central Motor Carriers Association* v. *United States, et al.*, decided February 7, 1944.

The Broad Question Presented

Purposely the case is not here briefed in full. Only so much need here be said as replies to the motion to affirm.

This, then, is the broad and important question involved which the Government now says is so unsubstantial that affirmance per curiam is obviously required: Is it within the authority of the United States District Courts, under the reviewing statutes, to annul and set aside orders of the Interstate Commerce Commission refusing to "grandfather" motor carrier applicants the right to withdraw prior to decision their permissive applications to the Commission for contract motor carrier permits?

The court below indicated that such right of withdrawal before Commission decision probably is substantive under the decision in *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1. In their motion to affirm counsel for the Government go further and now concede that the right of withdrawal of applications before decision is substantive under this Court's decision in that case. Contradictorily, however, both the court below and counsel for the appellees consider that the right of withdrawal *before* decision cannot be vindicated until *after* decision in view of *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125. That position is taken even though this Court in *Rochester Telephone* did not allude to *Jones* v. *Securities and Exchange Commission* in enumerating those administrative orders, negative in form, which may or may not be reviewed. The question of the reviewability of administrative orders denying the privi-

lege of withdrawing permissive applications before decision thereon appears purposely to have been left open by this Court in both those decisions.*

Yet here the Government contends that no substantial question is involved.

Far from being unsubstantial the question is both substantial and quite important now to be decided. In the majority opinion of this Court in *Jones* v. *Securities and Exchange Commission* the right of withdrawal of permissive applications to administrative bodies before decision was very positively and in comprehensive language sustained. The decision in that case went so far as to say that the mere filing of an applicant's request for withdrawal "terminated the proceeding". Refusal of the privilege of withdrawal before decision was denounced by the majority of this Court as "arbitrary and unreasonable".

If that be the present view of this Court there would certainly seem to be involved a very substantial question as to how the right of withdrawal before decision could be so emphatically expressed in that case by this Court and yet for it to be said that because of *Rochester Telephone* this important right of withdrawal *before* decision may not be vindicated in Court until *after* decision by the administrative bodies as to whether the permissive applications should be granted or denied. To withhold the right of judicial annulment of final administrative orders refusing the privilege of withdrawal of permissive applications *before* decision thereon would simply be tantamount to the destruction of such prior right of withdrawal itself. Also to say that after the administrative bodies shall have later granted the no longer wanted permissive applications the Courts then are available to set aside those orders because

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* Certiorari had been denied in that one of the two *Jones* cases not involving the feature of compulsory testimony. The lower court had held that the privilege of withdrawing Jones' application did not exist at all under the rules of the S. E. C. Therefore the refusal was held not reviewable because only procedural discretion was then thought to be involved.

the right of withdrawal previously had been refused is to suggest a strange and wasteful course of reviewing procedure.

To refuse the privilege of withdrawing permissive applications before decisions thereon is in itself an act of finality. It can never become more final than at the time of the refusal. If the right of withdrawal before decision is so far substantive that the mere request to withdraw "terminates the proceeding" and its denial is "arbitrary and unreasonable" it must be because the privilege of withdrawal *before* decision is itself a valuable and enforceable one. That value, whatever it may be in individual instances, cannot be preserved by compelling the applicant to forego the privilege itself until *after* the decision rather than before.

Just why it may be important to a permissive applicant to seek withdrawal before decision must of course be different in different cases. This Court appreciated that and set it forth in *Jones* v. *Securities and Exchange Commission*. It there was said that when requesting withdrawal of permissive applications before decision it was not necessary to give the real reason "or any reason at all" for making the request. That was a realistic attitude toward the obvious fact that business motives, sometimes confidential, are usually desired to be served. The value of the right to choose whether to go forward with the application or to withdraw it before decision would be frittered away by saying that not until after later administrative decision on the application itself may the courts be approached to vindicate the withholding of the privilege of prior withdrawal.

The decision in *Rochester Telephone Corporation* does not sustain the court below. True enough it was there and rightly declared that orders of these administrative commissions are not reviewable if their practical business consequence depends only upon some later administrative or judicial action. That broad determination rested upon *U. S.* v. *Los Angeles & S. L. R. Co.*, 273 U. S. 299, and *U. S.* v.

Illinois C. R. Co., 244 U. S. 82. In the first of these the decision was that a mere valuation of railroad property did not, standing alone, withhold any privilege, subject the carrier to any civil liabilities, or determine any right. In the latter there was involved the reviewability of nothing more than an order of the Commission setting a case for hearing despite a challenge to its jurisdiction.

The present case does not resemble those. Here the privilege of withdrawal before decision of a permissive grandfather application is *itself* a right preserved by the Interstate Commerce Act—not in terms of course but inherently as said in *Jones*. Hence to refuse the withdrawal is to deny a "privilege secured by statute" existing at the time of the refusal. Such an order of refusal cannot later be made more final in its effect than when first issued. To deny before decision the privilege of withdrawal is to deny a right which at the time is substantive. The refusal cannot acquire either validity or more invalidity later on. Rightly considered *Rochester Telephone* in principle more truly sustains judicial authority over orders of that kind as soon as they may be issued. It there was clearly set forth that the courts are at once available when, without lawful authority, the Interstate Commerce Commission "withholds a privilege" conferred or recognized by statute. Here the privilege of withdrawal before decision is held by the court below to depend upon what may in fact prove to be the nature of the *later* decision by the Commission in the presently undisposed of proceeding before it.

Whether the reason or all the reasons for wishing withdrawal beforehand may be revealed or not *Jones*, unless and until reversed, makes the right of withdrawal before decision a substantive one at the time and was not said by this Court to be contingent on any later event.

Government counsel here offer the small concession that appellant is allowed by statute to continue its truck leasing business as long as its original grandfather application remains undecided. The insistence is that therefore no present injury results because of the refusal of the Com-

mission to permit the application now to be withdrawn. To that suggestion only this much need be said: Firstly, the grandfather application itself did not embrace appellant's truck leasing business so there is nothing left before the Commission upon which it could properly take later action. Secondly, if in any aspect it could be deemed that the truck leasing business of appellant is "protected" by the undisposed of grandfather application that could be so only upon the condition that the appellant would now have to comply in the meanwhile with all the regulatory provisions applicable to contract motor carriers. Its failure to do so must risk prosecution. While Section 309, U. S. Code, Title 49, provides for "continuance of such operation" pending determination of a grandfather application the right thereby conferred is conditioned upon compliance with all the regulatory requirements and assumes that the applicant will continue to press for the eventual issuance of a contract motor carrier permit. But before such a permit could be issued the Commission would have to find that the applicant is "willing * * * to perform the service of a contract carrier by motor vehicle". Here it is not.

Therefore the substantial question now before this Court is not whether appellant's truck leasing business is or is not within the regulative statute. Whether it be covered by the grandfather application or not appellant has elected to withdraw the application before decision and thus "terminate the proceeding".

For the Commission to grant an unwanted contract carrier permit would settle nothing. Appellant could ignore it and go on with its business. A permissive order granting a permit would not command anything to be done. Maybe appellant here would, in that event, be privileged to contest it in the way now being attempted in *Cornell Steamboat* v. *U. S.*, pending for argument in this Court (No. 384, present term) but it would not be compelled to do so. The appellant could disregard it and await some Governmental approach to the courts.

If, however, appellant's right of withdrawal before decision should now be vindicated by this court the Commission would still be at liberty to seek by injunction or indictment judicial determination whether or not the truck leasing business of appellant is subject to government control (Section 322(a)(b), U. S. Code, Title 49). No intervening motor carriers or shippers are urging that a contract motor carrier permit or a common carrier certificate of public convenience and necessity should be had by appellant.

Such in rough outline is the nature of the case and the substantial questions which it presents.

The Particular Facts

Enough of the facts in the case is here set forth merely to show how unreasonable and arbitrary the Commission's particular action appears to be.

Here the appellant filed with the Commission its grandfather application back in 1936 for a contract motor carrier permit under Section 309, U. S. Code, Title 49. At that time a few of its motor vehicles were being used by it in the conduct of a small contract carrier haulage business. The rest of its considerable number of vehicles were put out to shippers under long term leases. But its grandfather application was carefully confined to the small amount of contract carrier business then being done. While the much larger truck leasing business was revealed in the application no permit covering it was sought.

Concluding to discontinue its small contract motor carrier business appellant first approached the Commission with a motion to "dismiss" its grandfather application for that reason but to be conditioned upon some kind of expression from the Commission assuring that it did not deem appellant's leasing business subject to regulation.

No express action was taken upon that motion at the time. Instead, afterwards, and seemingly in regular course, the Commission set down the original grandfather applica-

tion for public hearing. Appellant then demonstrated on the record that it had by that time discontinued its former contract motor carrier activities and moved for "dismissal" of its application on that ground.

Responsively the Commission's Examiner, in a recommended report and order, determined that no contract carrier activities any longer existed and added the further view that appellant's truck leasing business was immune from regulation. He therefore recommended dismissal of the application.

Division 5 of the Commission, noting the absence of exceptions by any party to the proceeding, thereupon permitted the Examiner's order to go into effect as the order of the Commission.

Appellant consequently adjusted its business affairs to what it supposed was an end of the matter. No party to the proceeding sought reconsideration.*

Four months afterward, however, Division 5 of the Commission, on its own motion, entered an order revoking the previous order of dismissal and put the original grandfather application down for "further hearing". Appellant gratuitously accommodated by putting in further evidence as to the nature and extent of its large truck leasing business but renewed its insistence that no contract motor carriage for hire any longer was conducted.

Still later Division 5 of the Commission again for the second time reopened the record with reference to appellant's truck leasing business. Once more appellant accommodated by further showing as to its truck leasing business. But it then stiffened its position at that further hearing by a motion, later filed in writing, to "withdraw" the original grandfather application and for dismissal of it "for that reason".

In short the Commission has been persisting in the effort to take an old grandfather application covering a small

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* Certain motor carriers had previously intervened and urged denial of the appellant's grandfather application.

amount of contract motor carriage (long since discontinued) as an instrument through which to go into appellant's large truck leasing business (not covered by the application itself) presumably to determine whether it is or is not subject to the Act. No separate "investigation" under its general powers was ever entered by the Commission.

For sound and appealing business reasons appellant considers that the point has been reached when it is compelled in self-interest now to "terminate the proceedings" by its *withdrawal* of the application which the Commission has been using as a basis for its inquisition into the truck leasing business not covered by the application itself. Thereby at least this particular effort of the Commission will have been defeated.

Division 5 by order refused the right of withdrawal and the full Commission did likewise. This action followed.

Conclusion

It is fairly to be inferred that what the Commission here has in mind is first to reach some kind of decision of its own as to whether appellant's truck leasing business is subject to Commission regulation. Senior United States District Judge Knox in the Southern District of New York has lately held that appellant's business is not within the Interstate Commerce Act. (*Keegan, et al.* v. *John J. Casale, Inc.*, not yet reported, and arising under the Fair Labor Standards Act.) The Commission in other cases involving truck leasing businesses appears to be reaching out to claim the authority.*

It is however at liberty to present its point of view by bringing original action in the courts under Section 322 of

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* See *Shields Extension*, 41 M. C. C. 100; *Conner Hauling Co.*, 41 M. C. C. 404; *Murphy*, 34 M. C. C. 841; *Winkler*, 41 M. C. C. 845; *Steffen*, 34 M. C. C. 779; *Hamm*, 41 M. C. C. 852.

the Act (Section 322, U. S. Code, Title 49). It seems not to want to do so. Perhaps its thought is that by first making its own administrative declaration in a given case it would then be better fortified in court through some form of action which either it or the appellant would afterwards institute. It would thereby derive the benefit of a presumption of rightness of its own view of the matter rather than be required to vindicate its position by original injunction or indictment proceedings under Section 322.

It is respectfully submitted that appellant may not against its will be put in any such position by the Commission. It has the right to "terminate the proceedings" by its voluntary withdrawal of the old application which the Commission is improperly using as a basis for its own further purposes whatever they might be.

Respectfully submitted,

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